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PRINCIPAL AND PRACTICAL FOUNDATIONS OF A GLOBAL CONSTITUTIONAL ORDER

ALLEN N. SULTAN*

“No great improvements in the lot of mankind are possible until a great change takes place in the fundamental constitution of their modes of thought.”

—John Stuart Mill¹

I. DESPERATELY SEEKING THE “OUGHT”

Experts of human behavior tell us that people first band together for the basic essentials of life: food and protection from the elements through clothing and shelter; and then, the vital need for security of the person. Thus, the security of the group grows out of, and in theory exists for, the security of each of its members.

Constitutional systems, therefore, do not arise in a vacuum, rather they are the product of a number of specific preexisting characteristics and exist for specific reasons. Look to the preamble of the basic documents of any political society and you will find these objectives most affirmatively proclaimed. Peace, security, happiness—these are their objectives. To achieve them, political societies or polities promulgate constitutions. Sadly, some populations include additional condemnable objectives, defiling Immanuel Kant’s categorical imperative of unconditional and universal binding moral obligations. It is in this manner that the troubles begin among our subsisting nation-states. Let us then inspect Kant’s proposition—this alleged “command of reason”—in the context of past and continuing challenges to our global society.²

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1. See generally JOHN STUART MILL, *AUTOBIOGRAPHY & OTHER WRITINGS* (Jack Stillinger ed., 1969).

2. WEBSTER’S NEW COLLEGIATE DICTIONARY 175 (1975). See, e.g., JOHN H. HALLOWELL, *MAIN CURRENTS IN MODERN POLITICAL THOUGHT* 242 (1950):

A categorical imperative is one which directs us to act in a certain way because of the intrinsic value of that way of acting. It commands that kind of conduct which is objectively necessary without regard to any personal advantage, desire, or more ultimate goal. And Kant declares that

In the human quest for a political philosophy, providence has afforded us only two general paths. We could choose to travel down the dusty road of Machiavelli, Hobbes, Hegel, and Nietzsche. Should we do so, we end up living in a society designed by one of their disciples, such as Lenin or the Nazi Alfred Rosenberg. Or, embracing the other option, we can take the more anciently rooted and increasingly enlightened road of Aristotle, Cicero, Gratius, Kant, Locke, Rousseau, Voltaire, Montesquieu, and Hume and live in a society designed by one of their disciples, such as Thomas Jefferson. History dictates that these options of philosophical choice have clashed during the past sixty years of the twentieth century—with humanity and the dignity of the individual being the victors! That victory is why we must continue to overcome challenges thrust upon us by psychopaths, such as Slobodan Milosevic and Saddam Hussein, which, cruelly, providence has sporadically imposed upon our history.

When the United Nations Charter was signed in San Francisco on June 26, 1945, its first six words were—and remain—“*we the peoples* of the United Nations.”³ Not “we the nations or future member nations,” nor “we the nations representing the peoples,” but simply “we the peoples.” Jefferson’s jussive (“When . . . one people . . . with another”) in the United States Declaration Of Independence was, therefore, given universal application in the Charter. Peace *with*, and *not at the cost of*, human rights was then combined with individual dignity to become the global ends to be sought.

These words in the United Nations Preamble created a watershed, a defining moment, in the still nascent struggle to fashion a constitutional order for our rapidly developing global society. At the time, few would have attempted to contest these objectives. There was no choice in the matter, as these efforts were mandated by the stark reality of clear necessity. They merely crystallized the costly lesson from the first half of the twentieth century and created hope for a fresh start after the slaughter and destruction of World War II. With the failure of the League of Nations, the world and its peoples had disdainfully fallen into a quicksand of despair—due in a very large part to the simple lack of minimally adequate international institutions of social organization.

there is only one such imperative: *Act so that the maxim of your act might be made a universal principle.*

3. U.N. CHARTER pmb1. (emphasis added).

II. HUMAN RIGHTS FOUNDERS OF THE UNITED NATIONS

Where, after all, do universal human rights begin? In small places, close to home—so close and so small they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

—Eleanor Roosevelt⁴

Academic and professional rumblings promoting a post-World War II international institutional order furthering humanitarian ends began years before the successful end of that wrenching experience. All knew that the raging conflict was nefarious in its conception and telling in its resolution. Given the weighty consequences, political foundations had to be established to avoid its repetition. This process commenced almost an entire year *before* the Japanese attack on Pearl Harbor on December 7, 1941, brought the United States unabatedly into the fray.

In January of 1941, President Franklin D. Roosevelt appealed to the United States Congress for open support of those nations that, in his words, were fighting to defend the “Four Freedoms—freedom of speech, freedom of religion, freedom from want, freedom from fear.”⁵ Seven months later he met with Winston Churchill in Argentina Bay, Newfoundland, and on August 14, 1941, issued the Atlantic Charter that embraced these freedoms as well as other objectives, including implementation of the principle of democracy.⁶

4. Eleanor Roosevelt, Remarks at a ceremony in the United Nations, N.Y., Mar. 20, 1958; reprinted in Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 197 WISC. L. REV. 171, 178 n.11 (1969). See also BLANCHE WIESEN COOK, ELEANOR ROOSEVELT: VOL. ONE, 1884-1933 18 (1992) (quoting the writing of Eleanor Roosevelt from 1958).

5. Samuel Eliot Morison, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 998 (1965).

6. *Id.* at 999. The enduring impact of the “Four Freedoms” subsists in the private domain in the Commission on Human Security. Presently co-chaired by Ms. Sadako Ogata, former United Nations High Commissioner for Refugees and Professor Amartya Sen, Nobel laureate in economics and master of Trinity College, Cambridge, the commission “responds to United Nations Secretary-General Kofi Annan’s call at the Millennium Summit to broaden the world’s view of peace and security to include the ‘freedom from want’ and the ‘freedom from fear’.” *XXIV Fulbright Assoc. Newsletter*, 2002, No. 3, at 2-3. Consisting of twelve members, it is designed to “promote wider international acceptance of

The following year, William Draper Lewis, who in 1942 was Director of the (private) American Law Institute (ALI), took the lead in seeking an international statement that would manifest and serve to implement the “essential human rights” contained in the Four Freedoms.⁷ To this end, he approached Doctor Ricardo J. Alfaro, the former President of Panama who was serving as Director of the American International Law Institute. For assistance, Alfaro turned to his friend, Professor Manley O. Hudson of Harvard Law School.⁸ In this manner, the efforts of these men commenced shortly after Pearl Harbor, and culminating some two years later, resulted in the ALI’s Statement of Essential Human Rights.⁹

Drawing upon extensive private, pre-war international legal activity,¹⁰ this key inceptive international document was prepared with the active participation of experts from twelve foreign nations,¹¹ “probably [representing] all existing cultures. . . .”¹² Fortuitously, the ALI Statement would prove to have significant influence¹³ on what, at the war’s end, became known as the “International Bill of Rights.” Combined with the joint undertaking of the American and Canadian Bar Associations’ 1944 International Law of the Future,¹⁴ as well as with other works at that time,¹⁵ the human rights tradition of the Enlightenment was, with these efforts, actively updated to serve our post-war renaissance of international

human security and its underlying imperatives, develop the concept of human security as an operational tool for policy formulation and implementation, identify critical and pervasive threats to human security, and propose action to result in practical improvements.” *Id.* In sum, their mission is to raise the quality of life, by realizing “concrete improvements for threatened peoples throughout the world.” *Id.*

7. Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT’L L. 540, 546 (1995) [hereinafter *How American Lawyers Prepared*].

8. *Id.* at 546-47.

9. *Id.* at 550-53.

10. *Id.* at 541-46.

11. *Id.* at 549 n.38.

12. *Id.* at 549.

13. *Id.* at 553.

14. *Id.* (citing American and Canadian Bar Associations, *International Law of the Future: Postulates, Principles and Proposals* (Jan. 1, 1944), reprinted in 38 AM. J. INT’L L. 41 (Supp. 1944)) [hereinafter *American & Canadian Bar Associations, International Law of the Future*].

15. Sohn, who was very active throughout this period also cites “several reports of the Commission to Study the Organization of Peace, which started dealing with human rights in 1940, including a thoughtful report by Quincy Wright.” *How American International Lawyers Prepared*, *supra* note 7, at 553 n.45. As this writer’s first professor of international law while a graduate student at the University of Chicago in mid-1950s, I can personally attest to Quincy Wright’s inspiring commitment and consuming efforts in the cause of human rights. His legacy as both a teacher and a scholar still guide me some five decades later.

normative jurisprudence.¹⁶ Fittingly, at war's end in 1945, Professor Hersh Lauterpacht published his influential volume, "An International Bill of Rights of Man."¹⁷

The individuals who were the architects of our present day regime of human rights were well aware of the axiom that "those who ignore history are doomed to repeat it." They desperately sought to avoid yet another instance where "popular discontent inevitably starts the vicious cycle of revolution, despotic rule and international war."¹⁸ They also knew that, fundamentally, the key to success rests in a regime of ethical jurisprudence that guarantees us *global* security for individual liberty.¹⁹

Not surprisingly, therefore, the ALI Statement contained in its preamble *the* essential concept: "The function of the state is to promote conditions under which the individual can be most free."²⁰ To this end, *it placed intellectual liberty up front:*

ARTICLE 1

Freedom of Religion

Freedom of belief and of worship is the right of every one.
The state has a duty to protect this freedom.

ARTICLE 2

Freedom of Opinion

Freedom to form and hold opinions and to receive opinions and information is the right of every one.
The state has a duty to protect this right.

ARTICLE 3

Freedom of Speech

Freedom of expression is the right of every one.

16. See American and Canadian Bar Associations, *International Law of the Future*, *supra* note 14, at 41.

17. THE INTERNATIONAL BILL OF RIGHTS 247, 463 (Louis Henkin ed., 1981).

18. *How American International Lawyers Prepared*, *supra* note 7, at 548 quoting 20 A.L.I. PROC. 184 (1943).

19. *Id.* See also *id.* at 545 (describing how James Brown Scott, the President of the Institute de Droit International in 1929, quoted the 1776 Virginia Declaration of Rights, which embraced the primacy of liberty and civil equality).

20. *Id.* at 550 (quoting a committee appointed by the American Law Institute, *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 18 (1946) [hereinafter *Statement of Essential Human Rights*]).

The state has a duty to refrain from arbitrary limitation of this freedom and to prevent denial of reasonable access to channels of communication.²¹

For the realization of the two components of intellectual liberty—freedom of conscience, and freedom of expression—the ALI Statement delineated the basic principle of individual justice with its analogue of judicial autonomy:

ARTICLE 7

Fair Trial

Every one has the right to have his criminal and civil liberties and his rights determined without undue delay by a fair public trial by a competent tribunal before which he has had opportunity for a full hearing.

The state has a duty to maintain adequate tribunals and procedures to make this right effective.²²

The ALI Statement also included the final important inter-related civil and political right, the precept of civil equality,²³ as well as its analogue of democracy,²⁴ the latter also forming a part of its preamble.²⁵

These were, and remain, the political, legal, and jurisprudential foundations of our post-war international governmental and human rights experience. As the fruition of these foundations continue to be pervasively articulated and implemented, we are increasingly enjoying the promise of centuries of humanitarian development. In our age of virtually instant mass destruction, failure in this ongoing dilative normative undertaking no

21. *Id.* at 551 (quoting *Statement of Essential Human Rights*, *supra* note 20, at 18).

22. *Id.* (emphasis added).

23. Article 17

Equal Protection

Every one has the right to protection against arbitrary discrimination in the provisions and application of the law because of race, religion, sex, or any other reason.

Id. at 552 (quoting *Statement of Essential Human Rights*, *supra* note 20, at 26),

24. Article 16

Participation in Government

Every one has the right to take part in the government of his state.

The state has a duty to conform to the will of the people as manifested by democratic elections.

Id. at 551 (quoting *Statement of Essential Human Rights*, *supra* note 20, at 25).

25. The preamble states, “[t]o express those freedoms to which every human being is entitled and to assure that all shall live under a government of the people, by the people, for the people, this declaration is made.” *Id.* at 550 (quoting *Statement of Essential Human Rights*, *supra* note 20, at 18).

longer remains a viable option. The security that results from its success lies in the wisdom and courage of every successive generation. For each must respond to their own challenges arising from the evils that, unfortunately, also still inhabit the earth. Such desultory perpetrations of terror on the human community have been, and must continue to be, challenged with increasingly speedy success.

III. MANDATE FOR THE NECESSARY GLOBAL INDIVIDUAL CONSENSUS

“The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations.”

—Cicero²⁶

Sir Isaac Newton pronounced the key Enlightenment proposition more than three centuries ago: the universe is governed by universal laws and, therefore, is predictable.²⁷ Yet, the overarching problem remains: fostering universal laws requires moral courage. With that vital quality, human reason that is implemented by determined leadership can increasingly perfect our global society. International peace and security, along with individual civil equality and justice under the rule of law—these are the delectations of intrepid leaders impelling institutionalized power. They are also the true political and social objectives of our system of universal law; they can be discovered and realized through simple human reason; and they are only compellingly implemented by propitious moral courage.

Clearly, as we have seen from the failures of the past century, this essential combination of virtue and fortitude has too often been pathetically absent. The paucity of this vital dimension of character in those who sought, as well as those who presently seek and often obtain, political power has been the scourge of history. Winston Churchill, Franklin Roosevelt, and Harry Truman stand in stark contrast to this bitter, grievous fact. Students of our recent history know that the absence of such valiancy during the first half of the last century resulted in an incredible surfeit of human carnage and incineration. Any new paradigm of global constitutional development therefore requires, first and foremost, the consistent ascendance of moral courage in leadership. The future cannot afford its absence. The people of the world must demand that their leaders assert such moral courage! Then, and only then, will they enjoy the

26. *Quoted in* ANTHONY EVERITT, *CICERO* 176 (2001).

27. SAMUEL ENOCH STUMPF, *PHILOSOPHY, HISTORY AND PROBLEMS* 76, 210-11 (3d ed. 1971); GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 460, 550 (1937).

security that is engendered by enlightened global constitutional development.

As we have seen, the foundational jurisprudential commitments to the norms and objectives of the United Nations Charter are, in human terms, compelling. When they are realized, overarching global *communal* interests should prevail. Harmonization of the inevitable differences among members of the international community will both foster and strengthen these global communal interests. With proper constitutional structures, the *reasonable* ambitions of nation states could and should be accommodated to the necessary demands of our enlightened global society.

Common knowledge dictates that power is almost always directed by particular interests, and therefore, the threshold task is clear: institutions for the implementation of our immediate global communal interests must be more swiftly identified, recognized, and articulated. Then, and only then, can they begin to be more fully embraced. Once so recognized and implemented, they should serve to enhance the political will that increasingly actuates a common national behavior affecting the entire global community.

A considerable amount of this essential global community reality has already been realized over the centuries through that body of customary international law known as “the responsibility of states.”²⁸ That doctrine, however, has been conceptually a negative, “thou shalt not,” paradigm of limitations on Westphalian sovereignty. What is needed is a new, firm, and positively formulated paradigm of international constitutionalism: global democracy wedded to effective responsibility in the service of human rights.

Nor should we shirk from this overarching objective. To be principled is not to be naive. Towards the end of his life, after the assent of Julius Caesar, Cicero concluded that the death of the Roman Republic resulted from the failure of its leaders to apply moral values.²⁹ In contrast, success in the Second World War and Cold War have proved that the conscious exertion of power for the cause of human morality can be victorious. Thus, we should not hesitate to recognize that through the genesis of a proper, dilative global constitutionalism we can achieve a parallel victory in global statesmanship.

As an universal enterprise, success in such a venture will represent

28. See, e.g., SAM BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 432-76 (4th ed., 1990).

29. *Id.* at 244.

vindication of the precepts of fundamental natural law that are expressed in the purposes and principles of the United Nations Charter. Because a parallel version of these precepts exist in all major cultures, this natural law constitutes the foundation of all human rights. In the words of Mahatma Gandhi, “We must become the change we seek.”

Where to begin the journey is not difficult to determine. When engaged, moral courage merely reflects the individual moral instincts common to all humankind. Jefferson called this happy quality, “the brightest gem with which the human character is studded.”³⁰ His “common sense” Scottish application of natural law holds that this moral instinct, inbred in human nature, and therefore in humankind, leads to *the interdependence of happiness*. Jefferson, along with Adam, Franklin and Washington, knew that all decent members of society benefit from social virtue, each from exercising civic responsibility to help his or her fellow citizens.³¹ One is not surprised, therefore, by Jefferson’s confident conclusion that “the mass of mankind has not been born with saddles on their backs.”³²

Extrapolating this creed to the international community has long ceased to be the sole domain of past humanistic visionaries like David Hume and Thomas Jefferson. As recently as 1965, the international jurist Wolfgang Friedmann pointed out: “[to] co-operate or perish’ is a stark fact, not an evangelistic aspiration.”³³ His admonition is only enhanced now that the

30. Letter from Thomas Jefferson to Thomas Law, July 5, 1814), in THOMAS JEFFERSON: WRITINGS 1333 (Merrill D. Peterson ed., 1884). Before coming to this conclusion, Jefferson made a conceptual distinction most relevant to those who insist on chauvinistic forms of “cultural relativism” in international human rights:

Some have argued against the existence of a moral sense, by saying that if nature had given us such a sense . . . then nature would also have designated, by some particular ear-marks, the two sets of action which are, in themselves, the one virtuous and the other vicious. Whereas, we find, in fact, that the same actions are deemed virtuous in one country and vicious in another. The answer is that nature has constituted *utility* to man the standard and best of virtue. Men living in different countries, under different circumstances, different habits and regimens, may have different utilities; the same act, therefore, may be useful, and consequently virtuous in one country which is injurious and vicious in another differently circumstanced. I sincerely, then, believe . . . in the general existence of a moral instinct. I think it the brightest gem with which the human character is studded, and the want of it as more degrading than the most hideous of the bodily deformities.

Id. at 1338.

31. George McKenna, *The “Dualities” of Thomas Jefferson*, FIRST THINGS, 53, 54. (June/July 2000), <http://www.firstthings.com/Ptissues/ft0006/articles/mckenna.html> (last visited Oct. 5, 2003). See generally JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* (1998).

32. See McKenna, *supra* note 31.

33. Wolfgang Friedmann, *The Role of Int’l Law in the Conduct of International Affairs*, 20 INT’L J. 158, 169 (1965).

planet has become even smaller, and the resulting challenges increasingly multi-polar. For example, our present dangers of global terror once again teach us that, left free and unchallenged, malignancy insidiously invades with pervasive and, at times, devastating effects. Like the plague, it does not respect political boundaries. That is why all civilized nations were easily compelled to swiftly agree to meet this latest, most pernicious global challenge—as did the United Nations Security Council.³⁴

For these reasons, the marriage of moral instincts to global communal action lights up the path ahead. When melded together they animate the profoundly obvious first essential task of embracing the paradigm of a global community based upon a constitutional rule of law—one that is in the service of human rights. Simply stated, there are no pariah nations; there are only nations under the control of pariah leaders. There was a time when Olympic grants and Papal concordats lent unfortunate credibility—yes even legitimacy—to such genocidal “leaders.” The “game” of diplomacy had to stay on course. Individual populations were deemed to be irrelevant in the precincts of international power politics. Positivism reigned supreme.

Such was the previous diplomatic “wisdom.” The history of the past century records the price of those horrendous states of mind. We have learned, at great cost, that sociopathic megalomaniacs possessing political power have been the international community’s greatest imminent danger. Despicably, they have constituted the human embodiment of our present day analogue of the “saddles” to which Jefferson so sagaciously referred. Therein lies the first clear and necessary communal interest of the new paradigm of global constitutionalism: a mind set that instinctively rejects such public evil and acts upon it.

Consider the following true event, most probably repeated untold times: Serbian paramilitary forces enter an Albanian town in Kosovo. The men and boys are shipped off, probably never to be seen again. The mature women are forced to cook and serve them a meal—while naked. In the early evening some paramilitaries enter the place of female confinement and take away very young pretty girls. Not too long thereafter, sharp screams break the still of the night.

Through all this, the individual and collective Serbian people permitted

34. S. Res. 1269, U.N. SCOR, 4053rd mtg. (1999), <http://ods-dds-ny.un.org/doc/UNDOC/Gen/N99/303/92/pdf/N9930392.pdf?OpenElement> (last visited Oct. 5, 2003); S. Res. 1368, U.N. SCOR, 4370th mtg. (2001), <http://ods-dds-ny.un.org/doc/UNDOC/GEN/NO1/553/82/PDF/NO153382> (last visited Oct. 5, 2003); S. Res. 1373, U.N. SCOR 4370th mtg. (2001), <http://ods-dds-ny.un.org/doc/UNDOC/GEN/NO1/557/43/PDF/NO155743> (last visited Oct. 5, 2003).

their government to so act in their name. This is not so surprising. After all, the individual and collective German people sat on their hands while Communists and other political dissenters, and then the Blacks, Jews, Roma, homosexuals, mentally ill or developmentally delayed, and any others deemed by authorities to be “useless eaters,” simply disappeared in a systematic manner. All of this occurred, while “acceptable” Germans were increasingly enjoying the riches of a conquered Europe.

The basic element wanting, then, is that all peoples must respond to the existence of such evil at home. They must eschew it at the outset. Then, and only then, will *both they and others* be secure from death at the hands of the government. Then, and only then, will “democide” no longer appear on our television screens.

Thus, we must rapidly work toward the time when the peoples of every nation *demand* democracy to secure their own human rights. The essential objective is a global mind set that will not permit the camel of tyranny to get its nose under any national tent. The mere suggestion that public evil could be a future outcome of suppositional leaders’ policies must produce an instantaneous public response. That is the key, the necessary global individual responsibility, the consensus that underpins the new global constitutional paradigm.

When, to paraphrase Louis Brandeis, public action is seen as a political duty,³⁵ individuals everywhere will enjoy the peace and human rights they so pervasively desire. Time and again history dictates that when the need for that courage of individual and cumulative moral action is lacking, we enter the leviathan, and with it a political deluge. At bottom, the fate of peoples everywhere does not lay in their stars, but simply in themselves.³⁶

IV. OUR CENTRAL CORE OF GLOBAL MORALITY

“We do not wish to gloss over or ignore the serious differences among the individual religions. However, they should not hinder us from proclaiming publicly *those things which we already hold in common* and which we jointly affirm, each on the basis of our own religious or ethical grounds.”

—Küng and Kuschel³⁷

35. *Whitney v. California*, 274 U.S. 357, 375 (1927).

36. See WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 1, sc. 2, lines 140-41 (David Bevington ed., Addison-Wesley 4th ed. 1997) (addressing Brutus, Cassius states “[t]he fault, dear Brutus, is not in our stars, [b]ut in ourselves, that we are underlings.”).

37. *A Global Ethic: The Declaration of the Parliament of the World’s Religions* 22 (Hans Küng & Karl-Josef Kuschel eds., 1993).

The ubiquitous conflict between faith and reason, mutually inhabiting the human psyche, constantly revives the inquiring mind. That sage of practical reason, Aristotle, who continues to frame so much of our everyday lives, felt compelled to fashion his handmaid of theology, metaphysics, to round out his exposition of human thought. Thus, he contributed his reflections upon ontology, the nature of being, and upon cosmology, the orderly system of the universe. His logical next step was epistemology: what are the limits *and validity* of the nature and grounds of human knowledge? In making that determination, must the heart ever be in tension with the head? Must there be an unending conflict of faith and reason?

It is not mere happenstance that the Renaissance was preceded by three philosophers who strove to *meld* faith with reason. Each represented a child of Abraham, with the earlier informing the latter. Because Baghdad was the ancient fountain of learning, one is not surprised to see Islam lead the way in the form of Avicenna. Born in Persia in the year 980, he was the first supreme ontologist.³⁸ He was followed by the Hebrew sage Maimonides in the twelfth century. An irrepressible rationalist, the contribution of Maimonides to the humanism of the Renaissance would be difficult to exaggerate.³⁹ Capping them all was the Dominican, Thomas Aquinas.⁴⁰ Building upon a foundation of Aristotle, who he referred to as “the philosopher,” Aquinas framed the theory of natural law that innately led to that flowering of human knowledge we know as the Renaissance.⁴¹ His fusion of faith and reason followed a simple formula: God made humans and gave them the power to reason.⁴² Thus, the product of that reason is also sovereign principle. That is why Jefferson, at the outset of the Declaration of Independence, could refer to natural law as “the Laws of Nature and of Nature’s God.”⁴³

In our present day, discussions and debates regarding the tensions between faith and reason generally rest in the province of the religious functionaries and of the students of ethics that reside in colleges and universities. As the world shrinks, the pressures for global, as distinct from merely Christian, ecumenism create an unquestionable urgency. Mere

38. STRUMPF, *supra* note 27, at 163; SEYYED H. HASR, THREE MUSLIM SAGES 25 (1964).

39. PAUL JOHNSON, A HISTORY OF THE JEWS 179, 190 (1987).

40. SABINE, *supra* note 27, at 250; STRUMPF, *supra* note 27, at 171-72.

41. SABINE, *supra* note 27, at 249; STRUMPF, *supra* note 27, at 173; JOHN H. HALLOWELL, MAIN CURRENTS IN MODERN POLITICAL THOUGHT 28 (1950). For a compendium of their work, see Allen N. Sultan, *Judicial Autonomy Under International Law*, 21 U. DAYTON L. REV. 585, 597-613 (1996).

42. LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 55 (1987).

43. UNITED STATES DECLARATION OF INDEPENDENCE (U.S. 1776).

academic studies or inter-religious moral dialogues⁴⁴ about substantive differences no longer suffice. Rather, contemporary realities demand that comparative religious ethics be placed in the service of reaching practical agreements that “might help alleviate human suffering and otherwise advance human well-being.”⁴⁵

Clearly, this present effort had been illuminated by the prescient C.S. Lewis during the middle of the last century.⁴⁶ His work reflected an understanding of the need to frame a concrete commonality of conclusions from discussions that date back at least to the 1839 World’s Parliament of Religions. However, interfaith discussions of “moral issues of general concern”⁴⁷ is one thing; agreed upon documentary text is another. Only the latter can both inform and help authenticate any global constitutional paradigm. Should it have the imprimatur of both academics and religious functionaries, so much the better.

Realization of such a documentary text melding the postures and objectives of both groups was finally realized⁴⁸ at the 1993 Parliament of World Religions. Desirous of an agreed upon text, in 1992, the council that convened the Parliament authorized one of its members, Daniel Gómez-Ibáñez, to request Hans Küng, a theologian in Tübingen, Germany, to draft just such a document.⁴⁹ Parliament members hoped that his text would establish a “global ethic” that would embrace a “moral consensus among the world’s religious and cultural traditions.”⁵⁰ They realized to be stable or generally acceptable, such a proposed consensus must be “minimal” in nature, containing only the basic and essential, or a core, of agreement on such normative values.⁵¹ In this manner, “Toward a

44. This has been explained in the following manner:

Interreligious moral dialogues seek to address the question of how we are to think about and respond to moral problems such as these in a religiously and culturally pluralistic world. These dialogues typically call upon the religions of the world, and upon all people of good will, to share responsibility for the creation of a more just and peaceful order at local, regional, and global levels.

Bruce Grelle, *Scholarship and Citizenship: Comparative Religious Ethicists as Public Intellectuals*, in *EXPLOICATION IN GLOBAL ETHICS* (Sumner B. Twiss & Bruce Grelle eds., 1998) [hereinafter Twiss & Grelle].

45. Sumner B. Twiss & Bruce Grelle, *Introduction: A New Venue for Comparative Religious Ethics*, in Twiss & Grelle, *supra* note 44, at 1, 2.

46. C.S. LEWIS, *THE ABOLITION OF MAN* 95-121 (1947).

47. Twiss & Grelle, *supra* note 44, at 1.

48. *Id.* at 3-4.

49. Sallie King, *A Global Ethic in the Light of Comparative Religious Ethics*, in Twiss & Grelle, *supra* note 44, at 119.

50. Twiss & Grelle, *supra* note 44, at 2.

51. King, *supra* note 49, at 124.

Global Ethic (an Initial Declaration)” was proclaimed by the 1993 Parliament.⁵²

The legitimacy of this document, of course, depends upon how accurately it reflects *truly global*, and not merely Western, values of life, world view, religious faith, and the resulting propriety of human behavior. Measured by these standards, this recent compendium of absolute norms of human morality has much to commend its substantive authenticity. Purposefully minimal in number, these norms appear unchallengeable by any measure of humanitarian enlightenment. Such agreement, however, raises the question of their interpretation and application: that is the next challenge! Such concerns are obviously predicated upon the document’s eventual acceptance.

What then, is the potential utility of the “global ethic” as a foundational instrument to inform a new paradigm of global constitutional law? The answer lies in the efficacy of three aspects of the document: its universal nature, the validity of its basic substantive provisions, and the anticipated problems of the latter’s application.

Regarding the issue of its universality, the document possesses considerable legitimacy. One only has to reflect upon its theological and philosophical assumptions to conclude that the document has much to commend it:

Item: Every competent introductory course in philosophy indicates that, independent of each other, every major religious tradition of the world has procreated its own version of “the golden rule.” Clearly, Hans Küng embraced this commonality of religious cultures, which is merely the epitome of social and political common sense.⁵³ Thus, the overarching mandate of his draft: “There is a principle which is found and has persisted in many religious and ethical traditions of humankind for thousands of years: *What you do not wish done to yourself, do not do to others!* Or in positive terms: *What you wish done to yourself, do to others!* This should be the irrevocable, unconditional norm for all areas of life”⁵⁴

52. *Id.* at 119.

53. Twiss & Grelle, *supra* note 44, at 1-2; Fernando R. Tison, *International Human Rights and Cultural Relationism*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 43-44 (Richard Pierre Claude & Burns H. Weston eds., 1992); HENRY J. STEINER & PHILIPS ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 219-25 (1996).

54. Küng & Kuschel, *supra* note 37, at 23-34, 71-72 (emphasis removed), *cited in* King, *supra* note 51, at 119-20.

Item: In preparation for his draft, Küng “consulted with over a hundred scholars and representatives of world religions.”⁵⁵ Like the United Nations Universal Declaration of Human Rights,⁵⁶ the document represents all, not just Western, value systems.

Item: In preparing the draft, Küng made “an obvious effort” to utilize “ancient ethical codes found in the world’s religions.”⁵⁷

Item: The participating signatories of the document were religious leaders of the following religions: Baha’is, Brahmanism, Kumharism, Buddhism, Christianity, practitioners of native religions, Hinduism, Jainism, Judaism, Islam, neo-pagans, Sikhism, Taoism, Theosophism, and Zoroastrianism.⁵⁸

Given the care in its preparation and promulgation, *the general* representative religious universality of the Global Ethic would be difficult to challenge.

Turning to its basic substantive provisions, the document simply declares that human behavior should be guided by four “directions” distilled from “ancient ethical codes found in the world’s religions.” The ancient ethical codes are:

1. Commitment to a culture of non-violence and respect for life.
2. Commitment to a culture of solidarity and a just economic order.
3. Commitment to a culture of tolerance and a life of truthfulness.
4. Commitment to a culture of equal rights and partnership between men and women.⁵⁹

Making absolutely no claim to replace either the scripture or the cultus, or forms of worship of any religion, these minimal propositions can be said to serve as a beacon for *any* just society. This necessarily includes any global society based upon the precepts of liberty, civil equality, justice, and other human rights. Clearly, these are consentaneous, valid, substantial provisions. Moreover, they are the product of highly acknowledged referents, such as natural law, divine will, natural reason,

55. King, *supra* note 51, at 119.

56. *See, e.g.*, PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS*, 219-25 (1998).

57. King, *supra* note 51, at 120.

58. *Id.* at 120 (citing Küng & Kuschel, *supra* note 37, at 37-39).

59. *Id.* at 120-22; Küng & Kuschel, *supra* note 37, at 24-34.

cosmology, and the values necessary for an enlightened life.⁶⁰ For who will vote for murder, theft, deceit, bigotry, and starvation? Therein lies the validity of these principles of a “global ethic” as a foundational instrument.

When one looks to the last concern, that of anticipated problems of implementation of these values, a myriad of specifics can easily infest the mind. At the outset, we must summarily dismiss the rantings of the various and sundry despots who claim “cultural relativism”⁶¹ from human rights obligations to simply justify the repression so necessary to maintain their own absolute power.⁶² Similarly, those egomaniacs tying themselves to an established, respected religion, who mouth religious ideology and then sleep with every young girl above the age of twelve in their Waco, Texas compound, or fly airplanes into buildings, must also be completely ignored. In any discussion of religion that hopes to make the slightest claim to legitimacy, they are nothing less than pariahs who must be cast out from the true faith that they so inimically desecrate—period.

That leaves the serious claims of certain non-violent, yet ideologically rigid fundamentalist groups, *indigenous to virtually all religions*, who claim their *interpretation* to be the only true application of their respective scripture. To use a contemporary phrase, to them, as far as religion is concerned, “it’s my way or the highway.” Of necessity, their rigid posture rejects any notion of “a shared vision of moral and social values compatible with a variety of religious and cultural world views,” any “unity within a diversity.”⁶³ In other words, they are, at this point in time, constitutionally incapable of embracing any “moral consensus (that is legally enshrined) among diverse nations and traditions that have openly acknowledged their mutual recognition of the human importance of these values.”⁶⁴ Thus, they constitute a “stumbling block,” a clear and present challenge, since they completely reject the necessary “public recognition grounded in shared historical experience of what life can be like without these conditions fulfilled.”⁶⁵ In sum, numerous recent examples of

60. Sumner B. Twiss, *Religion and Human Rights: A Comparative Perspective*, in Twiss & Grelle, *supra* note 44, at 155, 162-63.

61. See, e.g., HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 323-402 (2d ed. 2000); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 42 (Richard Pierre Claude & Bruns H. Weston eds., 1992); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 410-19 (1984).

62. King, *supra* note 51, at 136; Lauren, *supra* note 56, at 272-74.

63. Twiss, *supra* note 60, at 162.

64. *Id.*

65. *Id.*

genocide and the continuing instances of contemporary starvation—our “shared historical experience”—are simply not sufficient to adjust their absolutist interpretation of religious doctrine.

The response to that inflexible posture by members of the “global ethics” community has been usually antipodal in nature. One group says, in effect, that “it’s useless to try—simply cut them loose” and continue without their participation.⁶⁶ Others opt for perseverance. They contend that the “global” ethic, to be truly “universal,” must include even those who presently practice religious exclusiveness. Thus, Sumner Twiss holds:

Although it is true that fundamentalist movements are generally suspicious of international human rights, which they tend to associate with the “demonic” secularism of the modern world, it is not entirely true to say that they lack values and commitments resonant with human rights. For example, many of these movements deplore war, torture, and genocide—attitudes clearly consistent with individual and collective rights to physical security and suggestive of some shared ground. Moreover, most of these movements are deeply and actively committed to advancing practical measures for adequate nutrition, housing, medical care, education, and other essential social services, positioning them positively in relation to second-generation human rights. (Economic, social, and cultural rights). To be sure, such matters as gender equality and freedom of thought and expression remain deeply contested issues for fundamentalists, but the approach I have been developing demonstrates at least some ground for comparison and dialogue of a constructive sort, keeping open the possibility that these movements may in the future find internal resources for accepting more fully and self-consciously the international consensus on human rights.⁶⁷

This latter approach of anticipatory inclusion must be embraced for obvious political purposes. Any model or representative canon of global ethics that serves to both inform and buttress any paradigm of global constitutional law must be as universal as is possible. In the end, James Madison was correct: The constitutional umbrella should be made to cover the maximum “sphere”—the most peoples, the greatest territorial areas, the most factions and parties, the maximum amount of interests.⁶⁸ In sum,

66. King, *supra* note 51, at 129-30.

67. Twiss, *supra* note 60, at 172 (citing RELIGION AND HUMAN RIGHTS 27-28 (John Kelsay & Sumner Twiss eds., 199)).

68. THE FEDERALIST NOS., 10, 51 (James Madison).

we must persevere to include them by convincing them of the commonality of our objectives and of the benefits that they will produce.

A global ethic to which almost all identify will engender both individual and general allegiance and support for the necessary global constitutional institutions designed to implement its norms and precepts. Such a system of constitutionalism built upon this virtual universal moral consensus will, then, have a far greater possibility of success—to the betterment of all nations and peoples that it serves.

V. PROACTIVE RESPONSIBILITY

“Do your duty in all things. You cannot do more. You should never do less.”

— Robert E. Lee⁶⁹

As indicated above, the marriage of moral instincts to global communal action lights the path ahead. This marriage illuminates the compelling need for a global constitutional paradigm, informed by our global ethic, and founded upon the rule of law in the service of human rights. Such a realization demands pervasive and comprehensive efforts of good will, a simple function of the moral imperative. Among them is the recognition and application of what both history and the human mind tells us of the existence of inherent truths in human actions.⁷⁰

We must begin with a heightened recognition of the principle of responsibility on the part of both individuals and of officials acting in his or her public capacity. At times wanting in many local and national human relationships, such responsibility appears to be, until relatively recently, often seriously lacking on the international plane, even though it has presently been embraced by *all three* regional human rights treaty regimes.⁷¹ It is true that there have been some heartening improvements:

69. Quoted in Sandra Day O'Connor, Eulogy for Justice L. Powell (Aug. 31, 1998), in 20 ABA NATIONAL SECURITY LAW REPORT 1, 3 (No. 4, Nov. 1998).

70. This chapter is inspired by, and draws heavily from Roger Rosenblatt's essay, *The Commission Report: The Law of the Mind*, TIME, Feb. 21, 1983, at 39 (dealing with the Israeli Kahan Commission's report on the responsibility of Ariel Sharon for a Beirut massacre of Palestinian refugees).

71. A recent “landmark” Decision of the African Commission on Human and Peoples Rights points out, *inter alia* that:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (*See Union des Jeunes Avocats/Chad*). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v.*

“superior orders” was rejected as a defense at Nuremberg;⁷² “command responsibility” has been increasingly strengthened at ongoing international criminal trials in The Hague. And, of course, the Israel Kahan Commission Report⁷³ in 1983 made a valuable and not sufficiently recognized contribution: It both impressively articulates, and then fully embraces, the jurisprudential concept of proactive responsibility.

One can place varied labels on this doctrine of individual fault that, when violated, is often the harbinger of disaster. Significantly, proactive responsibility has deep roots in the Judeo-Christian tradition, and was considered a sin of omission by Thomas Aquinas.⁷⁴ Presently, the doctrine takes varied forms in municipal legal systems. For example, the degree of citizen-to-citizen and citizen-to-state responsibility deemed actionable as criminal or civil fault, including negligence, is clearly greater in nations embracing the civil law than in their common law counterparts. Because the former system is based on the Roman law tradition, it protects individuals’ liberties equally, or as much as, the latter that follow the English common law. This fact suggests that such “indirect responsibility” clearly presents absolutely no threat to any regime of human rights. Stated another way, proactive or indirect responsibility poses no danger to the personal dignity of every individual that the civil and political rights of such legal regimes are designed to pervasively foster.

Individual civil rights and liberties are one thing. The responsibility of officialdom to those human rights is another. Thus, the swift expansion of this common sense doctrine of proactive responsibility by necessity focuses only upon the latter, upon those who wield political power and upon their proxies. The proposition has been both eloquently and succinctly stated by one highly respected writer, Roger Rosenblatt:

Honduras. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

15th Annual Activity Report, SOCIAL AND ECONOMIC RIGHTS ACTION CENTER & THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS v. NIGERIA, Communication 155/96 ¶ 57 (2001-2002).

72. Rosenblatt, *supra* note 70; EDWARD M. WISE & ELLEN S. PODGER, INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 517-18. *See also id.* 615-16, 707-08; BROWNLIE, *supra* note 28, at 562.

73. *Id.*

74. *Id.*

. . . when someone in authority is told that he ought to have anticipated a disaster, it means that the grand total of his professional experience and knowledge demanded, beyond reasonable doubt, that he behave differently than he did. Indeed, it is also beyond reasonable doubt that he merely forgot or tossed aside all that professional experience and knowledge when he neglected to act. Thus, 'You should have known,' in certain circumstances, becomes a way of elegantly telling someone he's a liar, a liar more to himself than to others, possibly, but a liar nonetheless.

What this says about human nature is that one cannot escape his own knowledge; he cannot be baptized innocent on a moment's notice; nor may he be born again whenever difficulties make rebirth convenient. What this says about the comprehensiveness of reality is more far-reaching . . . In other words, . . . another, deeper reality (is) in the works, the reality of the silent connections the mind makes between experience and reason.⁷⁵

True, under this paradigm of enhanced official responsibility, gross incompetence and shallow carelessness can have serious consequences. This should be welcomed. It brings the guarantee that such types of individuals will have increasingly less control over the lives and fortunes of the great multitude of all the rest of us who are less protected. Indeed, in some circumstances we are not at all protected. With this doctrine possible future atrocities resulting from the abuse of political power would be deterred. Given a viable system of international action, we could look to a time when such official criminal behavior can no longer scar the human condition. Since the surfeit of such horrors continue to this day, proactive responsibility should not be summarily dismissed by canons of sophistry. If global peace is to grow, international responsibility must be its handmaiden.

Such liability would not in any way compromise our rock-bottom principle of individual guilt that can be traced back to the opening pages of the Book of Genesis, and is one of the foundations of any enlightened society.⁷⁶ Clearly, we have long recognized that an accused can be found guilty of the most heinous crime of murder upon a sufficient amount of purely circumstantial evidence. Can we then in good conscience absolve

75. *Id.*

76. Sultan, *supra* note 40, at 586-88.

the inaction by political leaders who we have every reason to believe know of the evils committed on their watch? In technical terms, holding them accountable is nothing more than a solid application of the present criminal requirement of the concurrence of both action (also justified by inaction) and guilty knowledge or intent. Because proactive responsibility by officialdom and their proxies satisfies all three principles—act, intent, and their concurrence—guilt is obviously justified.

Harry Truman's famous desk plaque "the buck stops here,"⁷⁷ clearly states the principle of official accountability so vital to any civilized society. Proactive responsibility to deter "the sins of omission"⁷⁸ is merely a vitally necessary expansion of that simple, true proposition. Both public morality and common sense demand that this truth be recognized and embraced by the global civil body politic. We need no experts of the human mind, or of religion, to implement the obvious, that which is known to all. The private consciences of public actors are matters of public concern when they import devastation on the innocent.

Welcome to the real world.

77. Truman Presidential Museum and Library, "*The Buck Stops Here*" Desk Sign, at <http://www.trumanlibrary.org/buckstop.htm> (last modified Feb. 20, 2003).

78. See *supra* note 73.